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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 186.

SOUTHERN IOWA ELECTRIC COMPANY, *Appellant*,

vs.

THE CITY OF CHARITON, ET AL., *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT OF APPELLEE.

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IN THE

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OCTOBER TERM, 1920.

No. 180.

SOUTHERN IOWA ELECTRIC COMPANY, *Appellant,*
vs.
THE CITY OF CHARITON, ET AL., *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT OF THE FACTS.

In addition to the statement of facts as made in Appellant's Brief the Court's attention is directed to the following:

This action was heard on the issue raised by Count I of the Amended and Substituted Answer and said count does not admit that the rate as fixed by the franchise ordinance is non-compensatory.

Count II denies that the franchise rates are non-compensatory.

Count I alleges that the franchise ordinance is a binding contract on the appellant company and the case was determined solely on that issue.

Counsel for Appellee believes it very material that the court's attention should also be particularly directed to the fact that the city of Chariton had owned and operated its own electric light plant for a great number of years prior to August, 1914, at which time one Edwin P. Perrigo sub-

mitted to the city counsel the proposition to purchase the same, set out as follows:

"Gentlemen:

Having been advised that the city of Chariton desires to sell its electric light plant and is willing to grant to the purchaser a franchise for the conducting during a term of years of an electric lighting, heating and power business I hereby make and submit the following proposals:

Appended hereto, and constituting a part of, is a form of an ordinance which, when passed and approved and ratified by the mayor and city council and electors of the city of Chariton, I will accept; and upon the passage, approval, ratification, and acceptance thereof I will pay in cash to the city of Chariton the sum of sixty-five thousand dollars for all the rights, privileges and benefits granted to me or to my assigns, in, by and under said ordinance, and for all the property now constituting the electric lighting, heating and power plant of the city of Chariton, and consisting of boilers and piping, engines, generators, exciters, switch boards and all other power house equipment and supplies, and also all poles, wires, cross arms, braces, transformers, conductors, conduits, meters, or other property and supplies belonging to the transmission system of said city, and also all other property of whatsoever description, including all records and contracts, excepting the real estate pertaining to said electric plant, the electrolier posts and office furniture. The city of Chariton to grant to me or assigns free from rent or cost the possession and use of the real estate and buildings now used by it in the production of electric lights, heat and power for a period of eighteen months after I or assigns become possessed of the property hereinabove described. It is understood that all property hereinabove mentioned pertaining to said electric light plant, excepting real property, electrolier posts and office furniture which may be now owned or acquired up to the time I come into possession of the plant, shall pass to me and also all records and contracts, and that I shall become possessed of all the property free from all claims or incumbrances.

I further agree to purchase meters now owned by customers of about 220 in number at a fair cash value.

I will enter into the street lighting and pumping contract hereto appended.

The expense of a special election called for the purpose of submitting the franchise ordinance to the voters will be paid by me.

I herewith enclose and deposit a certified check in the sum of five thousand ($5000.00) dollars as an evidence of my good faith, which, when this proposition is accepted, may be retained and shall apply upon the purchase price but which shall be immediately returned to me in the event this proposition is rejected.

This proposition in order to bind me shall be accepted by the mayor and city council of said city and the street lighting and pumping contract hereto appended entered into within ten days from the date hereof, and the ordinance hereto appended shall be duly passed, approved and ratified, all as provided by law, within sixty days from the date hereof.

Respectfully submitted,

EDWIN P. PERRIGO."

This proposition was accepted by the council by the following resolution:

"Be it resolved, by the city council of the city of Chariton, Iowa, that the proposal submitted by Edwin Perrigo to purchase the electric light plant of the said city of Chariton, Iowa, for the consideration of sixty-five thousand dollars ($65,000.00) and signed by Edwin B. Perrigo, and accepted and signed by the committee composed of W. A. Eikenberry, A. B. Gookin, E. A. Anderson, G. W. Ensley, O. J. Israel, and H. B. Blanchard, citizens, and J. M. Kneeland, F B. Curtis and E. F. Gasser, members of the electric light committee of the city council of the said city of Chariton, Iowa, be and the same is hereby accepted and approved with the terms and conditions therein contained, and further that this council approves the franchise, ordinance agreed upon by said Edwin B. Perrigo and the members of said committee.

J. C. SEWARD,

Mayor."

After this action was had the council adopted the franchise ordinance and the ordinance and proposition of purchase were submitted to the electors of the city to be voted upon as by law provided. The electors voted favorably and the ordinance was finally adopted by the council and accepted by said Perrigo who, almost immediately, assigned his interest to the Appellant Company.

I.

SUBMITTING THE PROPOSITION WITH THE ORDINANCE CONTAINING THE MAXIMUM RATE CLAUSE ATTACHED, AND THE ACCEPTING OF THAT PROPOSITION AND ENACTMENT OF THE ORDINANCE ON THE PART OF THE CITY AND ACCEPTANCE THEREOF ON THE PART OF THE COMPANY, CONSTITUTED A CONTRACT, WHICH THE CITY WAS AUTHORIZED TO MAKE.

Replying to that part of division one of the Appellant's Brief, reading:

> "The City of Chariton, in adopting the ordinance granting the franchise in question, including therein a section prescribing the maximum rates to be charged for current furnished to consumers, exercised its legislative power to regulate, control and fix rates under the provisions of Section 725 of the 1913 Supplement to the Code of Iowa, expressed the will of the city under the conditions then existing."

It is Appellee's position that the city did not exercise its "legislative power to regulate" at the time of adopting the ordinance but merely transacted a business proposition whereby it entered into a contract with Perrigo fixing a maximum rate.

Perrigo presented to the city his proposition which, boiled down, was; I am informed that you desire to sell your plant, "appended hereto, and constituting a part hereof, is a form of an ordinance which," if you will give me together with your electric light plant, "its boilers, piping, engines, generators, exciters, switch boards, * * * poles, wires, cross-arms, braces, transformers, conduits * * *", I will pay you $65,000.00 and will accept said ordinance. Section 3 of the "appended" ordinance provides,

> "The grantee shall sell current at rates not to exceed for monthly consumption those named in the following schedules:"

The acceptance on the part of the city of this proposal, the granting of the franchise and the acceptance of it, the parting with its plant, poles, wires, and the paying and accepting of the $65,000.00, would under most circumstances be construed to constitute a contract. And it is my contention that, under the laws of Iowa and the decisions of the court now addressed, it was a contract; that it was not a regulation of rates but was for every purpose a mutual agreement between

Perrigo and the city whereby a maximum rate was fixed for the entire life of the contract.

The statutes of Iowa give this city the right to contract,

"Sec. 720. Heating Plants—water or gas works—electric plants—purchase and sale of heat, gas, water and electric current. They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or extend the terms of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed. *And they shall have power to enter into contracts with persons, corporations or municipalities for the purchase of heat,* gas, water, and electric current for either lights or power purposes, and shall have power to sell the same either to residents of such municipality, or to others, including corporations, and to erect and maintain the necessary transmission lines therefor either within or without the corporate limits, to the same extent, in the same manner, and under the same regulations, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or special election.

Sec. 725. Regulation of rates and service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light or power for other necessary purposes, and to regulate and fix the rent or rate for water, gas, heat, light, or power; to regulate and fix the rents or rates of water, gas, heat and electric light or power; to regulate and fix charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract."

IT WAS CLEARLY THE INTENTION OF THE IOWA LEGISLATURE TO GRANT THE RIGHT TO CONTRACT.

Appellant's Brief properly sets forth the history of the legislative enactments of the State of Iowa pertaining to this issue but the conclusions reached are most unreasonable.

It will be noticed that the first legislation had on the subject gave to all cities the right to contract for rates. This law stood unchanged until the 22nd General Assembly, at which time cities of over seven thousand were given additional power to regulate. By this time the Legislators had learned that it was not good policy to permit the larger cities to enter into contracts binding the inhabitants and the future administrations to a certain rate and the manner in which the governments of the larger cities were being corrupted at that time is too well known to necessitate a review in order to justify the action of the legislature. Those legislators saw that cities must have the additional power to regulate in order that it might be possible to secure protection to the inhabitants and they knew that it would not do to let that power to regulate be abridged in any manner whatsoever.

In this connection it must be remembered that the original sections 421, 423, 425 applied to water works only. On the 9th day of April, 1888, the 22nd Gen. Ass. amended the sections so that they applied to electric light plants, and gas works, and on the very next day, April 10th, 1888, this same legislature gave to cities of over Seven Thousand additional power among which was: "to regulate the price of gas, electric light, and water rates, and to regulate and fix the charges for water meters, electric light meters, or any other device or means necessary for determining the consumption of gas, water, or electric light.

This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged."

Is construction of Appellant's council that on the 9th of April the legislators enlarged the power of the city by granting powers over other utilities and on the next day it repealed that part of the section which gave the right to contract to cities of over seven thousand reasonable? Repeals by implication are not only not favored in law but they are seldom made in fact.

Section 473 as it originally stood authorized Iowa cities to enter into contracts which the city could not break and the legislators, by Act of April 10th, 1888, simply gave the additional power to regulate and saw to it that that power could not be bartered away.

On July 4th, 1888, when Chapter 16 of the 22nd General Assembly became effective Iowa cities had the right to contract and there was no law saying that they could not con-

tract. The original statute was in full force. The Act of April 10th gave the additional power to cities over seven thousand to regulate and expressly recognized the right of those cities to contract, first for the reason that it did not repeal the original act which had been amended the day before, and, second, because it expressly provided that the contract which might be made under the original act could not take away the right to regulate. It did not say there should be no contract but merely that there should be no contract of a certain kind.

Note the language used in Section 1 of the act of April 10th, 1888. "That all cities of the first class and cities of the second class, having over 7000 inhabitants, and cities organized under special charters in this state in *addition* to the power now granted, shall have the further and *additional* power conferred by this Act, as follows, to wit: to regulate * * * and to regulate the price of gas, electric light * * *." It must be admitted that this act of April 10th did not repeal Sec. 473 which had been amended on the day before and that it granted the *additional* and *further* power just as it said it did. No reasonable being can reach any other conclusion. The intention is plain and the language and circumstances do not admit of any other possible construction. The Act itself is entitled "An Act Granting Additional Power to Certain Cities."

Counsel for Appellant says on page 43 of this Brief,

> "The foregoing outline presents the state of the legislation in Iowa upon this subject until the adoption of the Code of 1897. With the adoption of the Code of 1897, Sections 471, 473 and 475, as they appeared in the Code of 1873, together with the subsequent amendments thereof, were dropped from the Code and in consequence were repealed."

In this we differ:

The declared reason for Appellant's Counsel reviewing the legislative enactments is to aid the court in arriving at the intention of the legislators and it must be admitted that that intention must prevail in the construing of the statutes. This being the case the intention of the legislators must be determined to be as found in the old statutes, for no new statutes have ever been enacted upon the subject in such a manner as will enable the court to get the legislators' intent.

Section 725 is not a direct, distinct and separate legislative enactment. Sections 471 and 473 stood as the law from 1888 until 1897 when certain men were appointed by the legislature as compilers and commissioners and they codified Sections 471 and 473 and the Code of 1897 was adopted containing Section 725.

I do not contend that Section 725 is not the law. I simply say that the compilers sought to express the law in better form and combine the two old sections and that the law was not changed. Those men then took the law as it was and left it as it was and we must look to the two old statutes to gather the legislative intent.

The old statute uses the word "contract", the amendment of 1888 uses the word "regulate". The codifiers used the words "regulate and fix" and intended to and did mean exactly as did the legislators in enacting the old statutes. The legislators in the old statute used the language,

> "This shall not be construed to authorize the passage of an ordinance or resolution or the making of any contracts, whereby the above powers are abridged."

The codifiers used the language,

> "and these powers shall not be abridged by ordinance, resolution or otherwise".

And who can maintain in reason, that, while there is great difference in the wording, there is any difference in the meaning or intention? And who can maintain in reason, that both the legislators in the old statute anl the compilers in the revision did not mean exactly the same thing and that the language in both cases did not apply to the identical *"additional"* and *"further"* powers as granted by the Act of April 10th, 1888.

Appellant's contention is that the language "shall not be abridged by ordinance, resolution or contract" as found in Section 725 is an "absolute prohibition" against the right to contract, and even go so far as to take the position that the similar language used in the Act of April 10th, 1888, has a like effect. Just how they justify such a position in face of the fact that the Act clearly stated to be a grant of "additional and further powers" is not shown, but it is well established in law that the state, or the municipality under proper grant, has the right to contract that rates shall not be greater than a certain amount and has also the right to regulate those rates lower than that amount.

CITY CAN BOTH REGULATE AND CONTRACT FOR A MAXIMUM RATE UNDER THE IOWA STATUTES.

It is the Appellee's position that there is nothing either illegal or inconsistent in the legislatures providing that the city may contract for a maximum rate and may regulate it lower. Such a contract is binding on the utilities to not charge a higher rate. In the instant case the Appellant Com-

pany bound itself not to charge more than the rate as fixed in its proposal and the affixed franchise which it submitted to the council and did so with the condition that the city could regulate. The language is not a "prohibition" against contracting. It is a saving clause limiting the city and protecting it from contracts which would be ruinous to its inhabitants. And the reason for its use was because of the fact that the reports are full of cases where the city has granted a franchise agreeing to a certain rate, often for a period of 50 years, and the utilities companies have at all times in the past sought for and obtained the aid of all the courts of this land in upholding those franchises as being binding contracts, and this regardless of how great the hardship might be, on the city.

These cases are so numerous their citation is unnecessary and it is certainly a new and startling position for a utilities company to claim that it can make its own proposition, take a light plant over completely and not be bound by the rate agreement.

Since courts began writing opinions it has been the law of this land that authority given to a city to grant the right to the use of its streets does not merely give the city the right to say, yes or no, but carries with it the right to impose conditions. The court in rendering the opinion in this case correctly states the law as follows:

> "It is a general rule with relation to the exercise of the power by a city that "if the mode of exercise is not prescribed in the act or charter conferring the power, or in some other statute, the corporation may exercise the power in any usual and appropriate manner, according to its own discretion. 28 Cyc. 275, and authorities cited.
>
> "This statute expressly confers on cities and towns, the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation, subject, however, to the general rule, that the ordinance must be reasonable. The power given in substance is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred." *Davis vs. Town of Anita*, 73 Iowa, 325.

In the State of Iowa, a city is given the power to grant franchises without any limitation, except that such franchise shall not extend more than twenty-five years and that no exclusive franchise shall be granted. When this law was passed, it was, and still is, the well settled rule, that "when a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company, to occupy the streets with its structures,

whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose." 19 R. C. L., page 1153, Par. 427. Of course, such conditions must not be against law or public policy.

The city having the power to grant a franchise, the right to impose conditions, is limited only by the terms of the grant of the power. Therefore it is self-evident that unless other legislation, and especially Section 725 of the Code of Iowa, limits the power with reference to conditions to be imposed in granting franchise, a provision as to maximum rates will be binding.

Sec. 725 confers the power to "regulate and fix," but it does not specify how such power shall be exercised; and under the rule above stated, it has the power to use its own discretion as to how such power shall be exercised.

In *Miller vs. City of Webster City, Iowa*, 62 N. W. 648, Judge Deemer says,

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities and contains no limitations upon the power granted, the time, manner and expediency of its exercise are left to the discretion of the corporation; and the judgment of its officers upon such matters cannot be controlled by the Courts, so long as they act within the scope of their authority, the discretion of a municipal corporation within the sphere of its powers, is as wide as that possessed by the Government of the state, subject however, to the general rule that the ordinances must be reasonable. The actions of the city Council in the exercise of expressly delegated powers cannot be questioned upon the ground that it is in conflict with public interests."

The law of Tennesseee did not specifically delegate any power to the city to fix rates, while the Iowa law does specifically say the city can do so and we find this language in the cause of *Knoxville Gas Company vs. City Knoxville*, 253 Fed. Rep. 220.

"The City Ordinance said to the company.

"You may occupy my streets and alley for 50 years with your pipes, conduits and other things necessary to the manufacture and distribution of gas, upon condition that you will never charge more than $1.10 per thousand cubic feet therefor.

The company replied in writing that it accepted the franchise with that condition. I think that constitutes a contract between the city and gas company."

"In McQuillin, Municipal Corporations, Sec. 1644, it is said, if the consent of the municipality is necessary to the use of streets by a public service company, the municipality, upon granting the right to use the streets, may impose conditions on the company which would be binding on the company if it accepts the right to use the streets. In *Boerth vs. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, the court said:

"Where a gas company is given the right to occupy city streets only with the consent of the municipality, the city is under no compulsion to grant such right, and as to the price thereof may impose such restrictions as to rates as it sees fit."

"The ordinance under consideration having been duly enacted under statutory authority, and the terms and conditions thereof having been voluntarily and understandingly accepted by the Gas Company in writing, constitutes a contract from which the plaintiff cannot be relieved without the consent of the city. *Cleveland vs. City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Cleveland vs. Cleveland Elec. Ry. Co.*, 194 U. S. 538, 24 Sup. Ct. 764, 48 L. Ed. 1109; *Detroit vs. Detroit Citizens' Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410 46 L. Ed. 592.

"Per contra, *Home Telephone Co. vs. Los Angeles*, 211 U. S. 270, 29 Sup. Ct. 53 L. Ed. 176, is cited and relied on by the plaintiff. I think that case is clearly distinguished from the instant case. There it is held that a municipality may not enter into a contract fixing unalterably during the term of franchise the charges for telephone service, and thus disable itself from exercising the power of regulation, under a charter authority to regulate telephone services, and to fix and determine the charges therefor, in the absence of clear and affirmative legislative expression granting such power, or from which such power may be necessarily implied. That is not the question before the court. The clause of the contract under consideration undertakes to bind the Gas Company to only one thing, to wit: that the Gas Company during the life of the franchise will never charge for gas more than the rate named. The city has not undertaken to nor has it contracted away its charter right of "prescribing the terms" on which the Gas Company may occupy its streets. It may yet permit the Gas Company to increase or under proper showing require it to decrease charges for its service. In the *Telephone Case, supra*, Mr. Justice Moody said:

"It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves may through their

relation with other facts turn the balance one way or the other."

I believe that I am perfectly safe in making the statement that no case in any jurisdiction of the United States can be found where cities have been given the power to "regulate" rates in a franchise which holds that such franchise rates were not binding on the grantee. There are cases which hold that the act of the state in enacting a commission with power to regulate withdraws the power of the city and that the action of the commission is not an impairment of a contract but these cases do not decide that there was no contract, they simply hold that so far as the city is concerned the state can withdraw the power. Some of these cases are cited in Appellant's Brief and have no application here.

On the question of the distinction between power to regulate and power to contract, and showing that one is a governmental power and the other a contractual one, that one requires action by the government and the other an agreement of both parties, and the city can do both see, *City of Noblesville, vs. Gas Co.*, 60 N. W. 1032.

So, in this case the right to contract was again based on the right to refuse the use of its streets, or to impose any condition it saw fit in granting such use. See also to the same effect, *Traverse City vs. Michigan R. Commission, P. U. R.*, 1918 F, page 752. See also *Traverse City vs. Citizens' Telephone Company*, 161 N. W. 986, where the court says:

> "While plaintiff was not given by its charter express power to regulate rates, it had, under its charter, implied administrative authority to make permissive contracts as to them."

But even if such were not the case, the Iowa Statute expressly grants the power to contract by the language "to regulate and fix". It is a familiar rule of construction that all parts of the statute shall begiven effect whenever possible and if the word "fix" means the same as "regulate" why was it added? But "fix" has been construed by the courts of other states to have two distinct meanings when used in connection with public utility rates.

See *Omaha Water Co. vs. City of Omaha*, 147 Fed. 1, Annotated Cases, Vol. 8, page 614, which aptly illustrates the different uses of this word fix by this quotation:

> "The power to *fix* and to *regulate* the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a governmental (6) power and

also of that of a business power. Are the inhabitants of a city paying rates not *fixed* by contract to quasi-public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power, which the state or city may exercise, but may not renounce. Is a city without water works and hence without rates at which any one will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years, is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. It is to procure water and get rates for the city and for its inhabitants."

See also *Woodburn vs. Public Service Commission*, 82 Or. 114, P. U. R. 1917 B, page 967, where the court distinguishes between the fixing of rates by compulsion, and the fixing by agreement:

"The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon the terms of a franchis. The exercise of a power to *fix rates by agreement* does not include or embrace any portion of the power to *fix rates by compulsion.* When Woodburn granted the franchise to the telephone company the city exercises its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak; but the city entered into the contract subject to the reserved right of the state to employ its police power and compel a change of rates, and when the state did speak, the municipal power gave way to the sovereign power of the state (citing cases). The power to *fix rates by compulsion* as distinguished from the power to *fix rates by agreement* is not granted to cities or towns nor is the right of the legislative assembly to legislate upon that subject curbed, by Article 11, Sec. 2, of the state Constitution, because in its essence it is neither a municipal power nor an incident to a pure municipal power, and therefore * * * the legislative assembly was not prohibited from making the Public Utility Act applicable to urban as well as extraurban territory."

See also *State ex rel., Tacoma R. & P. Co. vs. Public Service Commission*, 172 Pac. 290, P. U. R. 1918 E, page 277, at page 281, where the following comment on the Cleveland City R. Co. case, occurs:

> "In *Cleveland vs. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102, 24 Sup. Ct. Rep. 756, the court had occasion to construe a section of the Revised Statutes of the state of Ohio which authorized cities "to *fix* the terms and conditions upon which such * * * railways may be constructed, operated, extended, and consolidated;" and it was there held that this statute was an express authorization to the city to impose conditions when granting a franchise."

Now the Iowa statute goes even further, and instead of saying *fix conditions*, it says *fix rates*. So on the basis of the U. S. case, whichever way fix should be construed whether to fix by compulsion or fix by agreement, it would be sufficient to bind the utility.

See also *State ex rel., Western vs. Superior Court*, 19 L. R. A. 1915 C, page 291, where the court says:

> "The power to *fix* rates if exercised by a city, unless that power is clearly expressed by a legislative grant, is in the nature of a license, and revocable at the will of the legislature."

A reading of the case will show that the word is used in exactly the same sense as in the Iowa Statutes, for the question in the case is whether a binding contract existed because of this fixing of rates, and the court held that the contract was binding only until such time as the Public Utility Commission had acted, because there was no express power to *fix rates*.

See also P. U. R. 1918 F, Note on page 694, holding that the New York Commissioners are without jurisdiction to increase the rates of a Street Railway where fixed by franchise or contract, with a city, except on the consent of the municipal authorities. International R. Co. (1918) 104 Misc. 46, 171 N. Y. Supp. 193.

See also *Dawson vs. Dawson Telegraph Co.*, 137 Ga. 62, 72 S. E. 508, where the court held:

> "That granting of a franchise to a telephone company by an ordinance passed by the municipal authorities of a city, wherein it is provided that the company 'agrees and binds itself by this ordinance that the rates charged shall be $1.50 per month for residence phones and $2.50

per month for business phones,' and an acceptance of such franchise by the company, does not prevent the telephone company from increasing such charges, if permission to do so is subsequently granted it by the Railroad Commission; *especially as it appears that the city was not specifically authorized by its charter, or other legislative enactment, to fix the charges to be made by telephone companies* * * * The order of the Railroad Commission does not violate the provisions of the state and Federal Constitutions, prohibiting the impairment of the obligations of contracts."

This situation shows that it is the lack of the authority to fix charges which makes the contract lacking in binding force upon the utility commission. If the word there "fix" means to contract, then it should mean that in the Iowa statute also.

The above again shows that it is the lack of authority to *fix* charges which makes the contract lacking in binding force upon the Utility Commission.

That the state can delegate to a city both the right to regulate and contract or fix there can be no further question. *Cedar Rapids Gas Light Company vs. Cedar Rapids*, 223 U. S. 655, 562 Ed. 594. A construction that the Statute only authorizes a legislative regulation holds the words "and fix" to be surplusage, repetious and redundant and clearly disregards the universal and well recognized rule of construction.

The Iowa Legislature has very clearly expressed itself as to its understanding of the power of cities under their statutes. For instance with Street Railways Sec. 767 of the Code of 1897 provided that "Cities and towns shall have the power to authorize and forbid the construction of street railways." Section 776 provided that no such franchise should be granted without being voted upon and Sections 955, 956 and 959 simply further define the manner of the granting. At no place in these sections is it said that a city may "regulate and fix" or is any language of a similar import used but we find the 29th Gen. Ass. in Sec. 2033d of the Code of 1913, saying

"Cities and towns and cities acting under special charters shall have power to authorize and forbid the construction of such railways upon, or over, or along the streets, alleys and public grounds within their limits and to prescribe the conditions and regulations under which said railways shall be constructed and operated within said limits. But the right to operate as a street railway under section three of this act shall not be granted for a period exceeding twenty-five years. Nothing herein shall impair the obligation of contracts of such city or town heretofore made. This act shall not in any manner affect sections seven hundred seventy-five and seven hundred

seventy-six of the code, which shall be applicable to interurban railways. (29 G. A. ch. 81, Sec. 4.)"

Notice that the legislature directly recognized the right of the city to contract under the statutes of the code of 1897 by the use of the language "Nothing herein shall impair the obligations of contracts of such city or town heretofore made."

This legislature, the bench and bar and the public in general believed that a franchise was a valid and binding contract.

That the smaller cities of Iowa, such as Chariton, must have both powers is an absolute necessity, and I use the term "absolute necessity" advisedly.

This is a city of the second class and has a population of about 6000. It collects about $7000.00 on a ten mill levy which is the legal limit of the levy permitted for its general fund. Out of this fund must be paid all of the general expense of the city government and the cost of this and other litigation. In the argument of this case I informed the trial court that the city would never try this case on its merits and such is the fact. This is true for the reason that the expense of such a suit is prohibitive.

In this connection I desire to direct the court's attention to the fact that the Appellant Company, as set out in their bill of complaint, furnishes its product to the Cities of Chariton, Lacona, Russell, Lucas, Woodburn, Osceola, and the farmers along the route to the towns, to coal mines and railroad companies, all at different rates. Its contracts with farmers, mine operators and railroad companies are surely binding and they may pay a less or greater rate, or their losses may be greater and gains less. I have no way of knowing. But it will be observed that they claim they should be allowed a rate which will furnish a reasonable return on the capital invested, and not a rate which will reasonably pay for the product furnished.

In order to reach a conclusion on the merits it becomes necessary to find the cost of furnishing the product to Chariton and the return which they get for it. This must be compared with the cost of furnishing to Lucas and the return for it and that with the cost of transmitting it 30 miles further to Murray and the return for it, and so on all through the piece. And this will require the services of engineers and accountants to determine values of the different properties in the different cities and measure the different costs. And this labor is so great and so expensive that the entire revenue of the General Fund for one year would not pay it. As the court must know this is the first cost. It is "absolutely impossible". For this same reason it is absolutely impossible for the city to regulate down, and this fact is well known to the Appellant and all other utility companies, and those who finance them.

This, together with the fact that the inhabitants of all cities want the product of these companies and are not willing to put them out of business, is their safety. Otherwise they would never organize and operate.

But it may be said, "the city can grant another franchise." No, we can't, the law gives us the right but no one would have it. Without the street lighting contract the business would not pay and it will be noticed that the Appellant does not contend that the franchise is not valid as to that contract. It is good for the entire 25 years and they will enforce it. Neither can the city build its own plant. It must fullfil the street lighting contract with the company and that contract takes the entire five mills which the city is permitted to levy for electric light purposes and leaves the city in debt to the company so there is no money to pay for building a plant and none to bond.

Appellant's analysis of this ordinance, beginning on page 23 of this brief strikes one as being very amusing at first reading but when we recall the fact that the greater part of the inhabitants of the cities and towns which they supply still use coal oil lamps because of the expense of electricity the feeling of amusement gives way to one of bitterness. Notice the language, "This section also declares that the city shall not purchase current from others than the grantee during the period of the grant." This, they say, is a contract. Some parts are contractual in nature and some are legislative grants, none of which can be changed excepting Section 3, which is merely a temporary regulation, according to their interpretation. They hold to the right of the use of the streets of this city and stoutly maintain that the agreement for lighting those streets at a certain fixed rate is a binding contract, in short they claim that each clause which grants them any privilege or right must not be disturbed, but that they have the right to have the only section in the franchise which seeks to protect the inhabitants of the city who gave the grant changed.

It is just such conduct which has made the public in general suspicious of and disrespectful to all corporations, both the good and the bad, and in all due respect to the Iowa court which has, since the time of the rendering of the opinion of the Hon. Martin J. Wade, in this case, decided that Iowa cities do not have the right to contract, the public cannot be censured for giving vent to very bitter criticism of that court.

For instance in this particular case Mr. Perrigo made his proposition to these people. He advertised in the papers, distributed hand bills, displayed large posters and compared the rate he was offering with that which the people were paying in this and other cities. He had his paid agents canvassing each voter. Public meetings were held. Men reasoned, argued and fought over the proposition. The best of friends fell out and all of the time the prize held before the voter was

a rate of one cent less than he had been paying. And now this same voter is told by Appellant Company that Perrigo did not mean it and it must be admitted that the Iowa court has now held that the voter, through his officers, could not make a contract for this rate.

CITIES CAN BE DELEGATED BOTH THE RIGHT TO REGULATE AND CONTRACT.

Counsel for Appellant argues that the city cannot have the right to regulate and to also contract, that the act of the legislature in providing that the power to regulate and fix should not be abridged by contract shows conclusively that there was no attempt to grant the power to contract.

The very mention of the word contract in the same sentence with the words ordinance and resolution shows that the legislature recognized the right to contract, and it might just as well be said that the legislature prohibited the right of the city to pass an ordinance or resolution as to say that this clause prohibits the right of a city to contract. In other words the statute says "and these powers shall not be abridged by ordinance, resolution, or contract." Now if it is reasonable to conclude that the city cannot make a contract as to rates why not also conclude that the city cannot pass an ordinance or resolution in respect to them? All these words are used in exactly the same way and why apply the prohibition to one of them?

But, counsel for Appellant urges, that the power to regulate and contract cannot both be possessed by the city.

The law is well settled to the contrary.

It will surely be conceded that the state always retains the police power to regulate and can grant franchises containing rate conditions which, when accepted, become contracts upon the part of the donee precluding them from charging greater rate than that agreed upon.

This being the case, is there any law prohibiting the state from delegating both powers to the city?

The cases are numerous on the subject and it is settled that the city acts for the state in making such contracts.

State ex rel. Indianapolis Traction Co. vs. Lewis, P. U. R. 1918, F. page 113.

> "Contracts, as are here in question, although entered into by the city, are nevertheless contracts for the state on the one side, and the utility on the other."

See also *re Muncie Electric Light Co.*, P. U. R. 1918 B, page 195, at page 200.

> "We think it inevitably follows that where a municipality has granted a franchise to a utility, the contracting parties are the state and the utility; and they may at any time, by a subsequent agreement, rescind or modify the existing franchise, or agree to its cancellation and the substitution of an entirely different one. *Sloan vs. State*, 8 Black. 361; *Wilcox vs. McClellen*, 185 N. Y. 9, 77 N. E. 986; *Tippecanoe County vs. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *La Crosse vs. La Crosse Gas & E. Co.*, 145 Wis. 406, 130 N. W. 530; *Gary vs. Gary Interurban etc.*, P. S. C. I. May 25, 1913.
>
> In the Wisconsin case it was said: "What the plaintiff (the city) did, if anything of a contractual nature, since it appertained to the franchise itself, the state did. What the two real parties to the transaction mutually did obviously they could mutually undo."

See also *re Gary & Interurban Ry. Co. et al.*, 1918 A, page 88, at page 95:

> "We are of the opinion that it inevitably follows that where a municipality has granted a franchise to a utility, the contracting parties are the state and utility, and they may at any time, by a subsequent agreement, rescind or modify the existing franchise, or agree to its cancellation, and the substitution of an entirely different one."

That the city can both regulate and contract is also well settled.

In the case of *City of Manitowoc vs. Manitowoc and N. Traction Co.*, 129 N. W. 925, the court held an ordinance containing a maximum for interurban rates became effective on acceptance. And this was the holding in spite of the fact that the court found the rate which was then in existence was unreasonably low and in spite of the fact that the state had created a commission with power to regulate rates, and the city's sole power as to rates was through its right to grant the use of its streets.

See also *Salt Lake City vs. Utah Light & Traction Co.*, 173 Pac. 558. P. U. R. 1918 F. page 337.

Wilkensburg vs. Pittsburg R. Co., P. U. R. 1918 F. page 148-149.

Quimby vs. Public Service Commission, 223 N. Y. 244; 119 N. E. 433.

Collingswood Sewerage Co. vs. Collingswood, P. U. R. 1918 C. page 261. (N. J.)

State ex rel. Tacoma R. & P. Co. vs. Washington Public Service Com., 172 Pac. 890. P. U. R., 1918 E. page 277.

Sausalita vs. Marten Water Power Co., P. U. R. 1916 A. page 244.

Los Angeles vs. Los Angeles Water Co., 177 U. S. 558.

Knoxville Gas Co. vs. City of Knoxville, 253 Fed. Rep. 223.

Where the utility was held bound but the city still had the right to regulate.

> "It is further insisted that the ordinance is not binding on the city, and hence could not be on the Gas Company, since the present or any succeeding law-making power of the city may change or repeal the ordinance outright. In other words, the contract made by virtue of the ordinance is unilateral, and hence voidable by either party. This contention I think is met and refuted in *Omaha Water Co. vs. City of Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, where it is pointed out that municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office; the other business or proprietary, in the exercise of which they are governed by the rules as individuals or private corporations. The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions. Under *Knoxville Water Co. vs. Knoxville*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, it may be, if it appeared that by charging the maximum rate the Gas Company was realizing more than a reasonable return the city might require the Gas Company to charge less than the maximum rate named in the ordinance, since the contract only provides that the Gas Company shall never charge more than the rate named, and does not provide that it may not be required to charge less if the lesser rate appeared to be reasonable. That case is not authority for the insistence that the Gas Company, without the consent of the city, may charge more than the maximum rate, for which it contracted to furnish its patrons with Gas."

Knoxville Water Co. vs. Knoxville, 189 U. S. 436 stating "The contract between the city and the Water Company contained three distinct parts: First, the promise of the Company; next, those of the city; and last, the mutual understandings. In the first part the Company undertook as follows: 'Said Company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons.'"

"The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended, it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See *Georgia R. & Bkg. Co. vs. Smith*, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. Rep. 47; *Ragan vs. Aiken*, 9 Lea, 609, re Am. Rep. 684. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city "by ordinance to regulate the price of water" which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed. *Rockport Water Co. vs. Rockport*, 161 Mass. 279, 37 N. E. 168. This consideration answers a portion of the company's argument as to its rights under the 14th Amendment, and makes it necessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim."

The above citations held that the city can contract and possess the power to regulate also.

See also the opinion of the trial court in this action Rec. page 47.

II.

THE UTILITIES ARE ESTOPPED FROM CLAIMING THERE IS NO CONTRACT.

Appellant's counsel contends that because the Iowa Supreme Court has, since the rendering of the opinion by the trial court in this action, held that the Iowa statutes do not give the right to contract the Federal Courts are bound by that construction, and must reverse the decision rendered by the trial court.

However the case may be on that issue the court now addressed will follow its own decisions on the question of estoppel and its own interpretation of the common law and it is the rule of the United States Supreme Court that the appellant company cannot get the electric light plant belonging to the city of Chariton, its business, and its property under a representation that it will not charge more than a certain

rate, keep that property and escape its solemn agreement under the plea that the contract is *ultra vires.*

As to the Iowa rule see *Beach & Wild vs. Wakefield,* 107 Iowa, 567; *Fidelity Ins. Co. vs. German Savings Bank,* 127 Iowa, 591.

State vs. Chariton Telephone Company, 173 Iowa, 497, is cited by appellant to show that the Iowa court does not apply the rule of estoppel.

Attention is directed to the fact that in that case the city sought to oust the telephone company and the further fact that the court found that the telephone company operated in the city under a direct grant from the state and not a grant from the city, both of which facts distinguish it from the case at bar, as will be noticed in the following citations.

I will simply quote from a few cases which cite many U. S. Cases rather than to attempt to set down the many decisions on the subject.

See *Muncie Natural Gas Co. vs. Muncie,* 60 L. R. A. page 822, in which the court says,

> "But even if there was a technical want of power upon the part of the city to enter into a contract establishing maximum rates for natural gas service, yet we do not think that appellant, while enjoying the fruits of the contract, can attack it, notwithstanding the fact that the law of *ultra vires* is stricter in its application to public than to private corporations. Counsel for appellant seem to think that the cases in this state are somewhat out of accord with those of the United States Supreme Court, which has followed the English cases. The leading case in the United States on this subject is *Central Transp. Co. vs. Pullman's Palace Car Co.,* 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. Rep. 478, wherein it is affirmed that partly executed contracts *ultra vires* the corporation itself are void as to both parties; that they cannot be affirmed by estoppel or otherwise, and that, where the parties have so far acted upon such contracts that they cannot be restored to their original situation, the court is limited to the granting of such relief, if any, as can be given independently of the contract. The declarations of the case mentioned are no broader than those found in *Tippecanoe County vs. Lafayette M. & B. R. Co.,* 50 Ind. 85, wherein it is declared that a corporate "contract *ultra vires* the charter is void, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it;" and that, "if the act is *ultra vires* the corporation, it is void, and no one is bound." That all power not expressly or impliedly granted to corporations is withheld is a rule that the authorities without division apply in testing the validity of

the purely executory contracts of corporations; but in so far as the defense of *ultra vires* to a contract that has been partly executed is concerned, we must look to the cases, rather than to the lexicographers, for a definition of the term *ultra vires*. Without attempting to cover the whole ground, it may be said that, if a contract is of such character that, had the corporation at once proceeded to execute it, its act would have been contrary to public policy, or expressly or impliedly prohibited by statute, or would, in a degree, disable the corporation from the performance of its statutory duties, the undertaking cannot be enforced by either party. To this extent the cases, English, Federal, and state, are in reasonable harmony. Citations * * *

On the other hand, we have a number of cases, commencing with the leading case of *State Bd. of Agri. vs. Citizens' Street R. Co.*, 47 Ind. 407, 17 Am. Rep. 702, in which it is held, on the principle of equitable estoppel, that, where there is a mere defect of power upon the part of the corporation to enter into the contract a defendant, while enjoying the benefit of the contract, shall not be permitted to raise the question as to the power of the corporation.

Citations * * *

The cases last cited are not seriously if in any respect, out of accord with the Supreme Court of the United States. *In Union P. R. Co. vs. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 41 L. Ed. 265, 16 Sup. Ct. Rep. 1173, it was pointed out that in a line of cases in that court, including *Central Transp. Co. vs. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. Rep. 478, the contracts condemned as void were against public policy, and it was held that a contract as to which there was a doubt as to whether it was within the implied powers of a corporation was not to be condemned because of a remote chance that in the future it would partially disable the corporation from performing its charter duties. The defense that a contract is *ultra vires* the corporation does not deserve the execration it has received, since in most instances there is a collateral remedy in cases where there ought to be one. Although such contracts are not necessarily illegal, the *ultra vires* doctrine has its roots, like the rule of *par delictum*, in public policy; and its chief value lies in the fact that it is a brake upon improper corporate action, more efficacious, perhaps, in its practical results than the public remedy by information. As to cases, however, of mere defects of power, we think that it should be held, in accordance with the clear weight of authority in the United States, that, while the defendant retains the benefit of the contract, the state alone can raise the question. Tested

by this consideration, we hold that, while the appellant continues to use the streets of the city of Muncie to distribute natural gas to private consumers by virtue of said accepted ordinance, it cannot question the right of the city to enter into such contract."

Belfast vs. Belfast Water Company, 98 Atl. 738. P. U. R. 1917 A page 317.

"But the defendant contends that the contract is illegal, null and void for three reasons:

(1) That is "ignores the right of the state to regulate and control the terms and conditions of service by fixing terms and conditions unalterably for all time;" (2) that it "ignores the principle that utilities must serve all alike on fair terms, by a provision that a large and important part of the service shall be rendered without compensation for all time after the expiration of twenty years;" and (3) that it "ignores the right of the state to levy taxes upon a just and reasonable basis by fixing for all time certain public service as the measure of all taxation of the company's property."

For these reasons the defendant claims that it is under no duty or obligation to furnish water to the city, and that it has a legal right to discontinue the water service to the city, unless and until the city will make arrangements to pay fair compensation.

The city takes issue with the defendant on all these propositions. But it contends, also, that the defendant is now estopped from denying the validity of the contract which it adopted, and the benefits of which it has received. It is also urged that if the contract was *ultra vires*, it was so only as to the city, and that the question of *ultra vires*, and the contention that the contract was against public policy, can be raised only by the municipality affected, and not by the other contracting party.

(1) It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not *contra bonos mores*, he should not be permitted to question the validity of it; that he is estopped. *Ft. Worth City Co. vs. Smith Bridge Co.*, 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; *Richardson vs. Welch*, 47 Mich, 309, 11 N. W. 172; *Doane vs. Lake Street Elev. R. Co.*, 165 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; *Collins vs. Cobe*, 202 Ill. 469, 66 N. E. 1079; *State ex rel. Pope vs. Germania Bank*, 90 Minn. 150, 95 N. W. 1116; *Gibbs vs. Graig*, 58 N. J. L. 661, 33 Atl. 1052; *Flower vs. Barnekoff*, 20 Or. 132, 11 L. R. A. 149, 25 Pac. 370; *Dyer vs. Walker*, 40 Pa. 157, 2 Parsons, Contr. 961. And in *Joy vs. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 11 Sup.

Ct. Rep. 243, where a railroad company was in the enjoyment of a right of way through a park, and had reached the benefit of a large sum of money expended by the park commissioners, under an agreement with them, the court said that, without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law.

(2) Again, while it is true that in general the courts will refuse to enforce contracts *contra bonos mores*, there is good reason for saying that the defense of ultra vires can be made only by the party whose acts, or the acts of whose agents, are claimed to be ultra vires. The ultra vires contract of a municipality is a legal wrong. The party that is wronged may be relieved. The other contracting party is not wronged in the eye of the law. And it would seem that it cannot seek to be relieved, from a contract with which the other party is content. We have found no case where the other contracting party has been relieved, and no case where it has sought to be relieved, from a contract ultra vires a municipality. Ultra vires is properly a defensive proposition. It is a defense to an action seeking to enforce a contract. In every case, we think, it has been the municipality that sought relief. It is well settled that courts will not declare a statute unconstitutional except at the instance of those whose rights are injuriously affected by the unconstitutional provisions. They and they alone can do this. Courts will never, at the suit of one, pronounce a statute unconstitutional because it may impair the rights of others not complaining. *Williamson vs. Carlton*, 51 Me. 449; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Hingham & Q. Bridge & Turnp. Corp. vs. Norfolk County*, 6 Allen, 353; *Red River Valley Nat. Bank vs. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703. And if an unconstitutional provision cannot be attacked except by one whose constitutional rights have been invaded, much more it would seem for like reasons that a mere ultra vires contract could be attacked only by the party as to whom it is ultra vires. The decisions of the Federal courts in national bank cases are illustrative. They point to the doctrine that the *ultra vires* transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, even though they were impliedly forbidden, they are valid unless questioned by the government. *California Nat. Bank vs. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Union Gold Min. Co. vs. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432; *Union Nat. Bank vs. Matthews*, 98 U. S. 621, 25 L. ed. 188;

Reynolds vs. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Schuyler Nat. Bank vs. Gadsden*, 191, U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129."

Appellant has sought the jurisdiction of the United States Courts and must submit to the rules thereof. The facts in the case at bar preclude the granting of relief by those courts.

In this connection it is well to bear in mind that there is no attempt to regulate on the part of the city. Appellants allege in their Bill of Complaint that the rates as set forth in Sec. 3 are the rates determined by the city which "would produce a return sufficient to pay a reasonable income on the amount of capital invested." Rec. p. 39.

But the Appellant sets out the ordinance and proposal in the same pleading and they show that the rate was determined by Perrigo. It was his ordinance and his proposal. He drew them to suit himself and made an offer to the city.

It will also be noticed that Appellant seeks to recover from the city by reason of the fact that there is a contract by which the city agrees to use power for pumping water. This contract was also a part of the ordinance and proposal. And in this very action Appellant also seeks to enforce that contract and retain the benefits thereof.

Surely the doctrine of estoppel will lie.

As to the allegations of hardship the court has definitely settled the issue in *Columbus Ry. & Power Co. vs. Columbus*, 249 U. S. 399. And the language used in that case, "Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable."

III.

THE COURT IS NOT BOUND TO FOLLOW THE CONSTRUCTION PLACED ON THE STATUTE BY THE IOWA COURT.

At the time Appellant filed the Bill of Complaint in the Federal Court, and at the time that court decided adversely to the Appellant, there had been no construction of the statute by the Iowa Court.

It is not necessary to analyze the earlier Iowa cases cited by Appellant for none of them are in point. It is true that they contain dictum which might be read either way but they are not decisive. For instance in the case of *Iowa Ry. & Light Co. vs. Jones Auto. Co.*, 164 N. W. 780 (Iowa), the court said:

> "This section authorizes the council to fix compensation for services to be rendered, but in the absence of its exercise or of any *contract*, the company may fix and de-

mand reasonable compensation. Here the rate is defined by the terms of a franchise which is in the nature of a contract between the Company and the municipality, and the issue is, whether in agreeing not to exceed the compensation stated, meter rents are actually or impliably excluded."

A much stronger case is that of *Des Moines Street Railway Co. vs. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 513, in which the court said:

"The ordinance appears to us to be reasonable and our holding is that under our statute which empowers cities to authorize or forbid the laying down of a street railroad track, a city council may make a reasonable provision by contract for present and future street railroad service and may secure the company contracted with against the impairment of its profits for a limited time and against interference with its extension during the time, if a larger and better or more immediate service can be thus obtained."

Other cases decided in Iowa prior to the time of the opinion by the District Court contain statements showing that it was commonly understood by both the bench and bar that the city could contract, and the announcement of the doctrine of *Town of Woodward vs. Iowa Ry. & Light Company*, 178 N. W. 549 created consternation and amazement throughout the state.

Just how this case which affected nearly every citizen in the State happened to get into the Supreme Court of Iowa and out without anyone knowing of its existence is impossible to understand, and it is most difficult to determine from the reading of the opinion as to just how the court justified itself in over-riding the law as determined by almost a unanimity of court decisions.

However the case may be it must be admitted that the *Woodward* case does construe the statute adversely to the city. But the Federal court can follow its own decision on the question of estoppel.

The cases of *Ottumwa Ry. & Light Co. vs. Ottumwa*, 173 N. W. 270 and 178 N. W. 905 are again up for consideration. What the final result will be is most uncertain.

Appellant quotes at length from *Burgess vs. Seligman*, 107 U. S. 20 (pp. 78, 79 Appellant's Brief).

Note the language used by the court in this case:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was

under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

As heretofore stated, there had been no direct construction of Sec. 725 at the time the District court rendered the opinion in this action. The case of *Williams vs. Iowa Falls Electric Co.*, 170 N. W. 815, was decided upon the balance of convenience rule only and the court declined to construe the statute.

Again, under the rule of the *Seligman* case it is only when the question is "balanced with doubt," that the Federal Courts "lean" toward the views of the State court.

In this case there can be no question that the Appellant Company cannot come into this little city, take its plant and property under a plain and clear representation that it will not charge more than a certain rate during the life of the grant, seek to hold the city to the very letter of the franchise as to all benefits accruing to the Company and claim that they are not bound to carry out the only agreement made for the benefit of the city.

If they succeed in this action the people of this city are left wholly to their mercy.

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